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No. 89-1461

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In the Supreme Court of the United States

OCTOBER TERM, 1989

GILMORE STEEL CORPORATION, d/b/a
OREGON STEEL MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by failing to offer unreinstated strikers an opportunity to bid on job vacancies until after nonstrikers and strike replacements had failed to bid on them.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) unreported. The decision and order of the Board (Pet. App. 4a-15a), including the decision (Pet. App. 16a-65a) and supplemental decision (Pet. App. 80a-111a) of the administrative law judge (ALJ), are reported at 291 N.L.R.B. No. 27. The Board's order remanding the proceeding to the ALJ (Pet. App. 72a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1989. A petition for rehearing was

denied on December 14, 1989. Pet. App. 118a-119a. The petition for a writ of certiorari was filed on March 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a steel mill in Portland, Oregon, where it employs between 500 and 600 employees. For many years, petitioner's employees were represented in two separate bargaining units by local unions of the United Steelworkers of America, AFL-CIO (the Union). The last collective bargaining agreement for both units expired on September 1, 1983, and both units then went on strike. Petitioner continued to operate, using non-strikers, permanent replacements, and, in the clerical unit, a few temporary employees. Pet. App. 25a-26a.

On June 26, 1984, the Union, on behalf of the striking employees in both units, made an unconditional offer to return to work. By that time, all of the strikers had been permanently replaced, and they were placed on a preferential recall or "*Laidlaw*" list.[1] No agreement was reached on the terms of a new contract, and in January 1985 the Union was decertified as the representative of the employees in both units. Pet. App. 26a-27a.

After the strikers offered to return to work, petitioner filled vacant jobs by posting vacancy notices within the plant so that employees on the payroll could bid on openings. Unreinstated strikers were not permitted to participate in the bidding, but were notified of vacancies only when an opening was not bid on by an employee already on the payroll, or when

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[1] See *The Laidlaw Corporation*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

petitioner wished to fill the vacated position of a working employee who had successfully bid for a more desirable job. Pet. App. 27a-28a, 53a-54a, 85a-86a. Prior to decertification of the Union, petitioner used seniority as a basis for selecting strikers to fill any vacancies available after completion of the bidding procedure; after decertification, petitioner recalled strikers based on a determination of merit or performance. *Id.* at 30a.

2. The Union and a number of individual employees filed unfair labor practice charges, alleging, inter alia, that petitioner unlawfully refused to allow unreinstated strikers to bid on all available vacancies and to reinstate them according to seniority. Pet. App. 21a-22a.

a. In his initial decision, Pet. App. 16a-71a, the ALJ held that petitioner had no obligation to recall the strikers according to seniority. *Id.* at 30a-42a. The ALJ also found that petitioner had lawfully excluded unreinstated strikers from bidding on a job when that job was filled by a working employee and no vacancy was created by the transfer of the successful bidder, resulting in a net decrease in the work force. The ALJ noted that "[f]ollowing the strike, [petitioner], suffering business losses, attempted to reduce the size of its work force. When job vacancies arose, [petitioner] attempted to fill these positions from within the plant without recalling strikers, thereby decreasing its total work force." *Id.* at 27a. The ALJ concluded that with respect to those jobs, petitioner's "conduct [was] justified by substantial business reasons." *Id.* at 55a. The ALJ explained, *ibid.*:

> In the business down turn, [petitioner] was increasing its productivity and decreasing its work

> force. It could, therefore, nondiscriminatorily transfer employees without recalling unreinstated strikers. To hold otherwise would require [petitioner] to create vacancies for the unreinstated strikers and then lay off nonstrikers and replacements as a result of such transfers. *Laidlaw* does not create such rights for unreinstated strikers and should not be used to force [petitioner] to utilize such poor business measures.

The ALJ concluded, however, that petitioner violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by precluding unreinstated strikers from bidding for jobs that created an actual vacancy in the workforce. The ALJ pointed out that, if there was a vacancy in the workforce to be filled, "[w]hen employees were recalled from the *Laidlaw* list, it would be to jobs left vacant by either the transfer of employees on the payroll or the failure of employees to bid on jobs. The effect was that strikers were only recalled to less favorable jobs." Pet. App. 54a.

b. Finding that the ALJ had failed to consider relevant evidence or resolve credibility disputes concerning petitioner's alleged business justification for its bidding system, the Board remanded the case to the ALJ. Pet. App. 72a-79a. The Board noted that petitioner presented witnesses who testified that, because of the change in "equipment and job functions" after the strike, "unreinstated strikers were no longer qualified to perform the new jobs and operate the new equipment, and that its bidding procedure was essential to its survival." *Id.* at 75a. The General Counsel, on the other hand, presented witnesses who testified that the "skills needed in the production and maintenance process remained the same" and that the bid-

ding procedure was not supported by "considerations of efficiency." *Id.* at 76a.

c. On remand, the ALJ adhered to his initial decision. Pet. App. 107a. Citing *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967), and the Board's *Laidlaw* decision, the ALJ stated that "[t]he treatment of unreinstated strikers as inferior or subservient to other employees in this case is inherently destructive of the employees' right to strike and constitutes an unfair labor practice notwithstanding the absence of animus or bad faith *unless* the Employer sustains his burden of proof that the conduct was justified by legitimate and substantial business reasons." Pet. App. 87a-88a.

The ALJ found that there was "no testimony" supporting petitioner's contention that the "bidding procedure was essential to its survival." Pet. App. 88a. He rejected petitioner's claim that its conduct was justified by its own past practice and the practice in the industry of filling vacancies from the existing work force. The problem with that reasoning, the ALJ explained, was that, under *Laidlaw* and its progeny, the unreinstated strikers were part of petitioner's existing work force, while its bid procedures resulted in treating them as if they were laid off employees. *Id.* at 89a.[2]

The ALJ found that petitioner had not established, as to any of the posted jobs, that the post-strike changes petitioner had made in its product and method of operation had materially changed the jobs

[2] The ALJ noted that petitioner had never before been "faced with the situation of having unreinstated strikers awaiting recall pursuant to their *Laidlaw* rights." Pet. App. 56a.

or impaired the strikers' qualifications to perform them. Pet. App. 93a-104a. Concerning the clerical unit, the ALJ acknowledged that there was an increased dependence on computers, but he pointed out that petitioner "cannot argue that none of the unreinstated strikers could perform the job because it, in fact, chose an unreinstated striker to fill each position" after nonstrikers and strike replacements had passed up the bid opportunity. *Id.* at 93a-94a.

Concerning the production and maintenance unit, the ALJ concluded that, while petitioner had shown that its current operation placed greater demands on employees, that showing did not "establish that the unreinstated strikers were no longer qualified to perform the new jobs or to operate the new equipment. There is no reason to believe that the strikers could not cope with the greater demands of the changed operation as the non-strikers and replacements did." Pet. App. 104a.[3]

The ALJ emphasized that petitioner was entitled to fill vacant jobs "with the most qualified person, whether striker or not, and, whether reinstated or not." Pet. App. 94a, 101a-102a. Petitioner "was simply required to permit the strikers to bid * * * [and] could lawfully review the bids and select the most qualified person to fill the job." *Id.* at 95a, 103a. What petitioner could not do was refuse "to permit an

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[3] The ALJ credited the testimony of long-term employees that certain jobs remained the same after the strike. Pet. App. 97a-98a. He also found that production changes were part of an on-going process that antedated the strike, *id.* at 98a, and that, while petitioner established that there were changes in the production process, it did not establish "that the skills required * * * did not remain the same or that somehow the unreinstated strikers could not learn the new process." *Id.* at 101a.

otherwise eligible employee to bid for a vacancy because of his status as an unreinstated striker." *Id.* at 95a-96a, 103a (footnote omitted).

d. The Board upheld the ALJ's decision. Pet. App. 4a-15a. Nonetheless, it modified the ALJ's recommended order to require reinstatement and backpay only to those strikers found in compliance proceedings to have been denied reinstatement as a consequence of petitioner's failure to offer them an opportunity to bid on job vacancies. Pet. App. 7a, 10a; compare *id.* at 112a.

3. The court of appeals concluded that substantial record evidence supported the Board's findings and that it had correctly applied the law to the facts. The court enforced the Board's order in an unpublished memorandum order. Pet. App. 1a-3a.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. "[T]he status of the striker as an employee continues until he has obtained 'other regular and substantially equivalent employment.'" *Fleetwood Trailer*, 389 U.S. at 381 (quoting 29 U.S.C. 152(3)). Upon an unconditional offer by striking employees to return to work, an employer is obligated to accord preferential status to strikers who have been permanently replaced and to offer to reinstate them to their former, or substantially equivalent, positions when such positions become available. *Fleetwood Trailer*, 389 U.S. at 381; *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 103 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An employer commits an unfair labor prac-

tice if it refuses to reinstate strikers to their former, or substantially equivalent, positions without prejudice to their seniority or other employment rights, unless it "can show that [its] action was due to 'legitimate and substantial business justifications.'" *Fleetwood Trailer*, 389 U.S. at 378 (quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)).

At the same time, refusing to displace permanent replacements to provide jobs for unreinstated strikers is a "legitimate and substantial business justification[]." *Fleetwood Trailers*, 389 U.S. at 379; *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). As the Court reiterated in *Trans World Airlines, Inc.* v. *Independent Flight Attendants (TWA* v. *IFFA)*, 109 S. Ct. 1225, 1232 (1989), unreinstated strikers may not be discriminated against in the filling of available positions, but "[t]he positions occupied by newly hired replacements, employees who refused to strike, and employees who abandoned the strike, are simply not 'available positions' to be filled."

Relying on *TWA* v. *IFFA*, petitioner contends that it was entitled to restrict its bidding procedure to "currently working employees." Pet. 15-18. That contention lacks merit. *TWA* v. *IFFA* held that, at the end of an economic strike, an employer is not required to displace junior nonstrikers and early returning strikers in order to create vacancies for more senior full term strikers. 109 S. Ct. at 1230. Here, too, the Board held that petitioner was not required to permit unreinstated strikers to bid for jobs where the result would be to displace a currently working employee. *TWA* v. *IFFA* did not hold that an employer may preclude an unreinstated striker from bidding on a vacant job for which he is qualified when

the filing of the vacancy involves no displacement of a current employee.

Petitioner contends that its bidding system is not "inherently destructive" of the right to strike because "[i]t applies uniformly across the board—to new hires, replacements and *reinstated Laidlaw* people alike" and "does not create any obstacle to the future exercise of employee rights." Pet. 19-20 (emphasis added). But petitioner's system does discriminate against *unreinstated* strikers. As the ALJ found, petitioner's system excludes unreinstated strikers from consideration from all available positions until after working employees have had a chance to bid on them—an exclusion that, in effect, gives the working employees super-seniority over the unreinstated strikers. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).[4]

The Board, upheld by the courts of appeals, has consistently held that preferences for existing employees over unreinstated strikers in filling post-strike vacancies is inherently destructive of employees' right to strike. See, *e.g.*, *Arlington Hotel* v. *NLRB*, 785 F.2d 249 (8th Cir.), cert. denied, 479 U.S. 914 (1986) (employer unlawfully refused to consider strikers for positions for which they were qualified and which employer filled by transferring striker replacements and hiring new employees); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d

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[4] Petitioner errs in relying, Pet. 17, on the Court's statement in *TWA* v. *IFFA*, 109 S. Ct. at 1232, disapproving the expansion of *Erie Resistor* to the circumstances of that case. The Court's statement in *TWA* v. *IFFA* related to jobs that had been filled by permanent replacements and early returning strikers during a strike, not to the lawfulness of precluding unreinstated strikers from bidding on positions that became vacant after the strike.

1240, 1243-1247 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983) (unlawful to grant active employees preference over strikers in selection for openings in "special rated" jobs); *Wisconsin Packing Co.*, 231 N.L.R.B. 546, 549 (1977) (unlawful to give preference in job vacancies to currently active or laid-off employees over unreinstated strikers); *MCC Pacific Valves*, 244 N.L.R.B. 931 (1979), enforced in part, denied in part, and remanded mem., 665 F.2d 1053 (9th Cir. 1981) (same).[5] Petitioner's essential error is its assumption that it is permitted to treat unreinstated strikers as if they had no entitlement to reinstatement when jobs become available. As *Fleetwood* makes clear, "[i]f and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." 389 U.S. at 381.

2. Petitioner further contends that the Board improperly required it to prove a legitimate and substantial business justification for its conduct. Pet. 25-27. Petitioner asserts that under *Great Dane Trailers*, it need only "come forward with evidence" of such justification, and that *Great Dane* "does not say 'prove', either in the abstract or to the satisfaction of the Board." Pet. 27. But *Great Dane* does say, expressly, that, once it has been shown that an employer has "engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." 388 U.S. at 34. And *Fleetwood Trailer* made

[5] The court of appeals cases cited by petitioner, Pet. 18-19, do not involve the reinstatement of strikers, and they do not suggest that a refusal to consider unreinstated strikers for vacant positions would be lawful.

plain that "[t]he right [of a striker to reinstatement to an available position] can be defeated only if the employer can show 'legitimate and substantial business justifications'." 389 U.S. at 381 (quoting *Great Dane*, 388 U.S. at 34).[6]

3. Finally, petitioner contends that it proved a legitimate and substantial business justification on the basis of its need "to operate efficiently and with continuity." Pet. 29. That argument merely quarrels with the Board's finding, upheld by the court of appeals, that petitioner's refusal even to *consider* unreinstated strikers for available positions was not justified by business considerations. That fact-bound contention raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, as shown above, the ALJ amply supported his finding that petitioner did not have a substantial business justification.

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[6] As the Eighth Circuit explained in *Randall*, 687 F.2d at 1245:

> The [Supreme] Court [in *Great Dane*] set up the following balancing test: if it can be shown that the employer's conduct adversely affected employee rights, the burden shifts to the employer to prove a legitimate and substantial business justification. If the harm to employee rights is slight, and the employer shows business justification, the burden then shifts back to the charging party to show discriminatory motivation. However, no proof of anti-union motivation is required if the harm to employee rights is relatively great or if the employer fails to show business justification.

Accordingly, while the Board properly found that petitioner's conduct was "inherently destructive," even a finding of a lesser impact on employee rights would have imposed on petitioner a burden of justifying use of its bidding system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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